IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No 176 of 2002
and
TAX APPEAL No 177 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MAMTA TYPE SETTING WORKS

Versus

A.C.I.T.

Appearance:

1. TAX APPEAL No. 176 of 2002

MR SN SOPARKAR, SENIOR ADVOCATE WITH
MRS SWATI SOPARKAR and MR RAJU KOTHARI for Petitioner
..... for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 19/06/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Both these appeals are directed against the common judgment and order dated 25.1.2002 of the Income-tax Appellate Tribunal, Ahmedabad in ITA Nos. 4146 and 4147/A/96.

2. The appellant had purchased certain machineries and installed the same. We are informed that the machineries were in stalled in the previous year relevant to assessment year 1984-85. The appellant claimed investment allowance on the said plant and machineries. Since the income of the appellant was not sufficient for availing of the entire investment allowance, the appellant also claimed carry forward of the investment allowance for the assessment year 1985-86. The return for assessment year 1984-85 was filed on 29.6.1984 and the assessment order was passed on 31.3.1987. Similarly, the return for assessment year 1985-86 was filed some time in the year 1985 and the assessment order appears to have been passed in 1987.

The Income-tax Officer thereafter issued notice under Section 147 read with Section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") on the ground that he had reason to believe that the income chargeable to tax had escaped assessment in as much as the appellant had claimed investment allowance on the machinery which was sold within eight years from the expiry of the year of installation. Even in response to the said notice, the assessee filed return of income as per the original return claiming therein investment allowance in respect of the same machineries. The Assessing Officer accordingly passed order dated 15.9.1992 withdrawing the grant and carry forward of the investment allowance for the aforesaid two assessment years i.e. 1984-85 and 1985-86. The appellant challenged the said order by filing appeals before the Commissioner of Income-tax (Appeals) who by his order dated 31.7.1996 allowed the appeals and held that the reopening of the assessment was invalid and directed the Assessing Officer to allow carry forward of the unabsorbed investment allowance. The revenue challenged the said order of the Commissioner before the Income-tax Appellate Tribunal in the above numbered appeals. The Tribunal accepted the submission of the revenue and allowing the appeals of the revenue, set aside the order of the Commissioner of Income-tax (Appeals) and restored the order of the Assessing Officer.

3. At the hearing of these appeals, Mr SN Soparkar, learned counsel for the appellant has submitted that the

Tribunal has substantially erred in law in holding that even though the machineries were sold after the date of filing of the return, since the transfer took place before the Assessing Officer passed the assessment orders for the relevant years, it was the primary duty of the assessee to disclose the primary fact regarding disposal of the machineries and since this was not done during the course of the original assessment proceedings, the Assessing Officer was justified in reopening the assessment under Section 147 of the Act. The learned counsel has heavily relied on the decision of the Bombay High Court in CIT vs. IBM World Trade Corporation, (1982) 136 ITR 193 in support of his contention that since the assets were transferred after the date of filing of the return, the powers under Section 147 of the Act cannot be exercised, as no fault can be found with the assessee for non-disclosure of all the material facts in the return filed before the transfer.

4. We have carefully considered the submissions made by the learned counsel for the appellant and also the decision of the Bombay High Court in IBM World Trade Corporation's case (Supra). The relevant provisions of sub-section (5) of Section 32A of the Act read as under:-

"(5) Any allowance made under this section in respect of any ship, aircraft, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act -

(a) If the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed;"

There is no dispute about the fact that the machinery in question was sold before expiry of eight years from the end of the previous year in which the machinery was installed. There is also no dispute about the fact that the transfer took place after the date of filing of the return but before the Assessing Officer passed the original assessment order. In fact, the transfer is stated to have taken place in the year 1986 and the original assessment order for assessment year 1984-85 was passed on 31.3.1987. No fault can be found with the Tribunal's view that it was the duty of the assessee to disclose this fact of transfer before the Assessing Officer in the course of the original assessment proceedings.

5. The learned counsel for the appellant has heavily relied on the aforesaid decision of the Bombay High Court and submitted that the facts in the said case were identical to the facts of the present case and that there also the machineries were transferred after filing of the return and before the assessment order was passed and the Bombay High Court took the view that if the machineries were sold in subsequent years, then at the time of filing the return, the assessee could not be credited with the knowledge of sales which were to take place in the future so that it could be said to have omitted or failed to disclose fully and truly the facts about such future sales and that, therefore, the provisions of Section 147(a) of the Act were not attracted in the facts of that case and the Income-tax Officer could not reassess the assessee under the said provisions.

It is further submitted that the Bombay High Court also referred to the provisions under the Indian Income-tax Act, 1922, corresponding to the provisions of Sections 32A and 155(4A) of the 1961 Act and even then the Bombay High Court took the view that the reopening of the assessment was contrary to law.

6. In the first place, if the decision of the Bombay High Court is read in a manner so as to create an impression that the duty of the assessee to disclose truly and fully all the material facts stops with the filing of the return and that even if the assessee transfers the assets (on which the investment allowance is availed) before the assessment order is passed and before expiry of the eight year period stipulated in sub-section (5) of Section 32A, we are not inclined to agree with the said view of the Bombay High Court. When the provisions of Section 32A under which the investment allowance was claimed by the assessee, particularly sub-section (5)(a) thereof, clearly provide that any allowance made under Section 32A in respect of any machinery or plant shall be deemed to have been wrongly made for the purposes of the Act if the machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed, it clearly casts a duty on the assessee to inform the Assessing Officer about the transfer of the machinery or plant, on which investment allowance has been claimed or its carry forward has been claimed in the return, if such transfer takes place at any time before the expiry of eight years from the end of the previous year in which the asset was acquired or

installed.

7. In the case of IBM World Trade Corporation (supra), the Bombay High Court was concerned with a situation where the prohibition against transfer of the assets, in respect of which investment allowance was claimed, was introduced by Finance Act of 1958 which came into force on 1.1.1958. In facts of that case, the machineries were installed before 1.1.1958 and, therefore, the question whether the transfer of such machineries within ten years from the year of installation was prohibited or not was itself a doubtful issue. The Bombay High Court did not express any opinion on the said question as is apparent from the penultimate paragraph of the judgment.

In view of above, we are of the opinion that the decision of the Bombay High Court does not clinch the issue in favour of the appellant.

8. In view of the aforesaid discussion, we are of the view that the decision of the Tribunal does not suffer from any error, much less any substantial error of law. The appeals are, therefore, summarily dismissed.

(M.S. Shah, J.)

(K.A. Puj, J.)

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